89-257
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RRI REALTY CORP.,

Petitioner,

– against –

THE INCORPORATED VILLAGE OF SOUTHAMPTON, ROY L. WINES, JR., MAYOR, ORSON D. MUNN, JR., PAUL PARASH, CHARLES F. SCHREIER, JR., and RICHARD L. FOWLER, Constituting the Board of Trustees of the Village of Southampton, SHERBURNE BROWN, COURTLAND SMITH, VICTOR FINALBORGO, JOHN WINTERS and MORLEY A. QUATROCHE, Constituting the Board of Architectural Review of the Village of Southampton, and EUGENE R. ROMANO, the Building Inspector of the Village of Southampton,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

May a constitutionally protected property interest in a land use permit exist where local law provides for exercise of discretion in the issuance of the permit, but, under circumstances found to have occurred, removes that discretion and mandates the issuance of the permit.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit, whose judgment and opinion are sought to be reviewed.

The parent corporation of petitioner RRI Realty Corp. is Tarat Realty Holdings Corp.

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No.

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-against-

THE INCORPORATED VILLAGE
OF SOUTHAMPTON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner RRI Realty Corp. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 29, 1989.

OPINIONS BELOW

The opinion of the court of appeals and the dissent (Pet. App. A-1 - A-34)[1] are reported at 870 F.2d 911 (2d Cir. 1989).

The order of the court of appeals and the dissent dated May 15, 1989 (Pet. App. A-35 - A-36) denying petitioner's petition

[1] References to "(Pet. App. A-__)" are to pages of the appendix herein.

for rehearing and suggestion for rehearing in banc are not reported.

JURISDICTION

The decision of the court of appeals was dated and entered on March 29, 1989. The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing in banc was dated and entered on May 15, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTE AND ORDINANCE PROVISIONS

The United States Constitution, Amendment XIV, Section 1. (Pet. App. A-37.)

42 U.S.C.A. § 1983 (West 1981). (Pet. App. A-37.)

The Code of the Village of Southampton, Chapter 116, Section 116-32(E) (Gen. Code Pub. Corp. 1984). (Pet. App. A-37.)

The Code of the Village of Southampton, Chapter 116, Section 116-33 (Gen. Code Pub. Corp. 1984). (Pet. App. A-38.)

STATEMENT OF THE CASE

This case was brought pursuant to 42 U.S.C. § 1983 by petitioner RRI Realty Corp. ("RRI") in the wake of a series of acts by which respondents, officials of the Incorporated Village of Southampton, New York (the "Village"), deprived RRI of a building permit to which it was entitled by law and forced the shutdown of RRI's construction project. The issue presented is whether the Second Circuit majority correctly reversed a jury verdict for RRI upon its ruling that no property interest in a permit can exist where there is any degree of discretion in the application process, even if the existence of that discretion becomes irrelevant to the application by operation of law.

In 1979, RRI purchased an aging, uninhabited, 63-room mansion located on over 6 acres of property in the Village (T. 823, 835, 844-46, 854, 1214-15, 1371).[2]

The house was in a state of great disrepair, and RRI planned extensive renovations (T. 823-25, 835-36, 867, 1312, 1317, 1324, 1359, 1366, 1377). During the ensuing years, RRI worked closely with the Village's Architectural Review Board (the "ARB") and building inspector, in order to gain the necessary design approval and all required permits for the job (T. 61, 135, 151-53, 216, 267, 268, 469, 470, 858, 864, 867-68, 895, 968-70, 1029-32, 1363, 1369, 1378; E. 1-5, 49).[3]

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[2] References to "(T.__)" are to the trial transcript; "(A. __)" are to the joint appendix; "(S.A. __)" are to the supplemental joint appendix; and "(E. __)" are to the exhibit volume, all of which constituted the record on appeal to the Second Circuit.

[3] Pursuant to the Village's zoning code, the ARB is responsible for approving the design of buildings constructed in the Village and the building inspector is the highest ranking official in the Village's buildings department, responsible for issuing building permits. Village of Southampton, N.Y., Code ch. 116, §§ 116-33, A119-3 (Gen. Code Pub. Corp. 1984).

With the building inspector's and ARB's knowledge and permission, RRI engaged in the renovation of its house while its final design and building plans were being developed (T. 60-66, 341-42, 345, 373-74, 432, 470, 508-10, 895, 896, 1021-22, 1049-50, 1062, 1217, 1259, 1328, 1370, 1378-79, 1402, 1511; E.4).

By the spring of 1983, renovation had proceeded far enough to permit RRI to complete its design plans and seek final design approval from the ARB. In May 1983, the ARB gave formal design approval to RRI's home, which its members described as "magnificent" (E. 13; T. 66). Shortly thereafter, the building inspector wrote to RRI stating that the time had arrived to file an application for its building permit (E. 30).

Because the building inspector had already issued RRI a building permit for the kitchen area of the house, and because a small portion of RRI's new construction was the subject of a height variance application made by RRI, the building inspector requested RRI to limit its permit application to the portion of the house, outside of the kitchen area, which corresponded to the pre-existing structure. This came to be known as the application for the "Stage 2" permit (E. 255; T. 335, 336, 904-05, 1072-73, 1335-36).[4]

In February 1984, RRI filed its application for the Stage 2 permit (E. 254; T. 337-39, 389, 1071-73). On May 4, 1984, the building inspector prepared and signed the building permit and notified RRI that it was about to be issued (E. 259; T. 379, 1478-79). However, the building inspector never issued it, violating all of the explicit understandings he had reached with RRI (E. 37, 255-59; T. 379, 1478-79).

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[4] "Stage 1" represented the permit which RRI had already received for renovations to the kitchen area; "Stage 3" represented additions to the pre-existing house.

On May 17, 1984, the building inspector issued a stop work order, shutting down all of RRI's construction, purportedly because RRI did not have a building permit (E. 4).

The explanation for the withholding of the building permit and issuance of the stop work order (even though the permit had been approved and signed by the building inspector) is in a political controversy that erupted at that time in the Village. A group of people attempting to become a powerful political force in the Village made RRI's house a campaign issue (T. 119, 121, 297, 301, 304, 472, 576, 578-79, 605, 1130-43). The chairman of the ARB, who was a member of this group, refused to approve RRI's Stage 2 permit application, even though the ARB had formally approved the entire project the previous year, and even though the ARB's counsel advised it that it was "legally obliged" to sign the permit (T. 69, 117, 148, 357-58; E. 13, 252). The building inspector withheld the permit and issued the stop work order, even though he knew that the permit, which he had already signed, was legal and proper in all respects (T. 335, 336, 1301-02; E. 37-38).[5]

The New York State Courts Determined that RRI was Entitled to the Building Permit

On June 1, 1984, RRI commenced a mandamus proceeding in the New York State Supreme Court, to compel the issuance of the Stage 2 permit (A. 326-38). Under New York law, a writ of mandamus may only be issued where the official duty sought to be compelled is "clearly imposed by law" and "not discretionary," and where the right to its performance is "so clear as not to admit of reasonable doubt or controversy." *Burr v. Voorhis*, 229 N.Y. 382, 387, 128 N.E. 220 (1920).

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[5] The jury in this case found that the Village officials knowingly and intentionally treated RRI arbitrarily and capriciously for the purpose of depriving RRI of the Stage 2 permit (T. 2436-37).

The state court granted RRI's petition and directed the building inspector to issue the permit, holding that the ARB's refusal to approve RRI's application was arbitrary and capricious, and that, under § 116-32(E) of the Village zoning code, RRI was entitled to the permit (A. 332-38). Section 116-32(E) of the Code requires the prompt issuance of a building permit where the ARB fails, within thirty days of the reference to it of a building permit application, to hold a public hearing (unless the application is approved by an ARB committee), and all other applicable requirements have been satisfied (E. 100; S.A. 47-48; Pet. App. A-37).

Specifically, the state court found that thirty days from the reference of RRI's application to the ARB had passed without a hearing and all other requirements for the issuance of the permit had been met (A. 336, 337).[6] *RRI Realty Corp. v. Romano*, Index No. 84-10639 (Sup. Ct. Suffolk Co., Apr. 3, 1986) (unreported) (Pet. App. A-39-A-49), *appeal dismissed*, (2d Dep't, May 18, 1987) (unreported).[7]

This Action

In August 1984, RRI commenced this action under 42 U.S.C. § 1983, in order to recover the damages it suffered as a result of the years of delay in construction until it received its permit. After a four-week trial, in March 1988 the jury found that respondents had deprived RRI of its property — the Stage

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[6] The state court also found that the construction for which RRI sought the building permit was "for concededly proper legal work," "in total compliance with the zoning code," and that "political implications had a significant impact on the events as they transpired throughout the time frame of [RRI's] building application" (A. 335, 338).

[7] This decision was, of course, entitled to preclusive effect in the federal court. *Migra v. Warren City School District*, 465 U.S. 75, 81 (1984); *Petrella v. Siegel*, 843 F.2d 87 (2d Cir. 1988).

2 building permit — without due process of law and awarded RRI damages of $1.9 million.[8]

In a 2-1 decision, the Second Circuit reversed and remanded with directions to enter judgment for respondents, holding that RRI did not have a property interest in the permit.

The Second Circuit majority ruled that because at one time the ARB had discretion to deny RRI's permit application, RRI was forever barred from establishing a legitimate claim of entitlement to the permit sufficient to invoke the protection of the Due Process Clause. The majority found it irrelevant that (a) state law mandated that the permit be issued after thirty days; (b) the state court had issued a writ of mandamus (which may not be issued to compel discretionary action) finding that RRI had met all of the requirements for the permit; and (c) the jury had determined that had it not been for the impermissible political animus of Village officials, the permit would have been issued.

Judge Garth,[9] dissenting in strong terms, stated that once the ARB failed to hold a hearing, as it was required to do within the allotted thirty-day limit, RRI's right to the permit vested under state law because the Village zoning ordinance itself commanded that the permit be issued at that point.[10] The dissent therefore stated that a property interest existed. Judge

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[8] In accordance with then uniform Second Circuit authority, the jury was charged that it may find a property interest in the Stage 2 permit if it found that there was a very strong likelihood that, but for the violations of RRI's due process rights, RRI would have received the permit (T. 2432). *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985).

[9] Senior Judge Leonard I. Garth of the Third Circuit sat with the Second Circuit by designation.

[10] In fact, Judge Garth's point was made by the ARB's lawyer. In his opening statement, he told the jury that the ARB's failure timely to hold a hearing on RRI's permit application "was the equivalent of a grant" of the permit (S.A. 47-48).

Garth also dissented with respect to the denial of RRI's petition for rehearing and suggestion for rehearing in banc (App. Pet. A-35 - A-36).

REASONS FOR GRANTING THE WRIT

I

The Second Circuit's Decision Undermines The Prior Decisions Of This Court And Adds To The Substantial Confusion Which Exists Among The Circuit Courts.

With this decision, the Second Circuit has created a confusing and dangerous precedent, which misconstrues this Court's rulings in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and its progeny, and seriously undermines the policies developed therein.

According to the Second Circuit majority, no matter how fixed one's right to a permit is as a matter of state law, no property right can exist if anyone at any time in the application process had any degree of discretion to deny the permit. Thus, any local official, even those with purely ministerial duties in a particular matter, will have license maliciously to injure the members of the public with whom he or she deals, so long as he or she can point to another official with discretion in the matter, regardless of how irrelevant to the ministerial duty that discretion may have been.

This decision will surely have national repercussions, even in those Circuits that do not adopt its constitutional holding, because it will enable all local officials faced with suits claiming constitutional violations as a result of the improper refusal to issue a permit to claim immunity based on the lack of a "clearly established" constitutional right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1985).

In *Board of Regents*, this Court enunciated the rule that, in determining whether a property interest exists, courts must look to

> existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefit and that support claims of entitlement to those benefits.

Board of Regents, supra, 408 U.S. at 577. *See also Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property interest exists where rules or understandings support a claim of entitlement to a benefit).

Section 116-32(E) of the Village zoning code is the rule which applies here. It provides, in relevant part:

> The failure ... of the [ARB] ... to hold a hearing on any application which may have been referred to it, within thirty (30) days, ... *shall entitle* the applicant to prompt issuance of a building permit, provided that all other applicable requirements have been satisfied. [Emphasis added.]

As acknowledged by both the majority and dissenting opinions, and as found by the New York State Supreme Court, no hearing was held on RRI's application during the thirty-day period and all applicable requirements had been satisfied by RRI for the issuance of the Stage 2 permit.[11] Thus, RRI became absolutely entitled, pursuant to the explicit mandate of the Village' own zoning code, to the prompt issuance of the permit. Likewise, the building inspector's duty to issue the permit became purely ministerial.

A clearer case of a "legitimate claim of entitlement" (*Board of Regents v. Roth, supra*, 408 U.S. at 577) could hardly be imagined. Nevertheless, relying merely on the prior discretion of the ARB, which discretion was irrelevant to the mandatory duty imposed by law on the building inspector, the Second Circuit held that no property right existed.

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[11] The ARB even conceded that its lawyer advised it that it was "legally obliged" to approve RRI's permit application (E-252; T.117, 357-58).

If this Court's precedents are to have value, it is not the federal court's "judgment as to what interests are more significant than others" in determining whether a property right exists. It is "the language of the relevant statutes and regulations" which controls. *Kentucky Department of Corrections v. Thompson*, ___U.S.___, 109 S.Ct. 1904, 1909 (1989) (footnote omitted).

Thus, assuming, *arguendo*, that the Second Circuit correctly determined that the Village zoning code gave the ARB sufficient discretion to deny RRI's permit application during the thirty-day period so as to prevent a property interest from arising during that time, *that same zoning code* removed that discretion after the thirty-day period and directed the building inspector to issue the permit where, as was judicially determined here, the applicant met all of the permit requirements.[12]

In its final judgment (Pet. App. A-39-A-49), the New York state court ruled that whatever discretion the ARB had in this matter was (a) exercised arbitrarily and capriciously during the thirty-day period, and (b) irrelevant after the thirty-day period had expired. In accordance with state law, RRI was therefore adjudged entitled to the permit.[13]

In its decision, the Second Circuit majority failed to give the required deference to state law. It also failed to recognize

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[12] *Accord, Kentucky Department of Corrections v. Thompson*, ___U.S. ___, 109 S.Ct. 1904, 1910 (1989) (liberty interest created where statute uses explicitly mandatory language in connection with establishment of specific substantive predicates to limit discretion).

[13] This case thus presents an even stronger argument for the existence of a property interest than *Roy v. City of Augusta*, 712 F.2d 1517, 1522 (1st Cir. 1983) (even though statute in question did not create mandatory entitlement, state court determination that applicant had a right to a poolhall license created a constitutionally protected property interest in the license). In this case, the statute did create a mandatory entitlement.

that the passage of time alone may give rise to property rights. For example, this Court has determined that tenured employees have property interests in continued employment, although tenure is often acquired by the passage of a prescribed period of time. *Board of Regents v. Roth, supra. See also, Evans v. City of Chicago*, 689 F.2d 1286, 1297 (7th Cir. 1982) (right of judgment creditor to payment of tort judgment against municipality "becomes a property right under Illinois law" after expiration of specified period of time).

With no precedential toehold, the Second Circuit has ruled that a legitimate claim of entitlement does not exist — even though state law says that it does exist — if any official, anywhere in the application process, has some degree of discretion, no matter how irrelevant that discretion is to the official with the duty to issue the permit.

In so ruling, the Second Circuit has severely undermined *Board of Regents v. Roth, supra*, and its progeny, and added to the confusion among the Circuits as to its meaning. *See RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 926 (2d Cir. 1989) (Garth, J., dissenting) (Pet. App. A-34). Consideration of the matter by this Court is essential.

II

Clarification Of The Effect Of Official Discretion On The Availability Of Due Process Protection Is Needed.

The federal courts have followed an uneven course in "explicating the rationale for and the extent to which the Fourteenth Amendment protects landowners in disputes with local agencies empowered to limit the permissible uses of their property." *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914 (2d Cir. 1989) (Pet. App. A-8).

In *Yale Auto Parts Inc. v Johnson,* 758 F.2d 54, 59 (2d Cir. 1985), the Second Circuit appeared to have set its standards in this area. In *Yale*, the Second Circuit implemented this Court's decision in *Board of Regents v. Roth, supra,* stating that a constitutionally protected property interest in a permit exists when, "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would be granted." Discussing the effect of official discretion on this standard, the Second Circuit, in *Sullivan v. Town of Salem,* 805 F.2d 81, 85 (2d Cir. 1986), ruled:

> [W]e did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action . . . . On the contrary, our standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.

See also, Webster v. Doe, ___ U.S. ___, 108 S.Ct. 2047, 2053-54 (1988) (discharged CIA employee's claim for deprivation of property without due process upheld even though CIA director had discretion to discharge).

During the trial, RRI established with a massive amount of evidence, and the jury found, that had there been no violation of RRI's due process rights, there was at least a very strong likelihood that the Stage 2 permit would have been issued.[14]

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[14] The jury found that RRI had a property right in the Stage 2 permit and that RRI's due process rights were violated by respondents' knowing and intentional, arbitrary and capricious treatment of RRI for the purpose of depriving RRI of that permit.

Acknowledging the strength of RRI's evidence supporting the jury finding that the issuance of the permit was inevitable (absent the due process violations), the Second Circuit abandoned its prior decisions implementing *Board of Regents v. Roth, supra*, stating:

> Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny suffices to defeat the existence of a federally protected property interest.

RRI Realty Corp., supra, 870 F.2d at 918 (Pet. App. A-16).

The dissent correctly concluded that the majority's holding "can lead only to confusion in this area of the law." *Id.* at 926 (Pet. App. A-34).

The criteria developed by the courts of appeals in determining the extent to which due process protection applies to applicants for land use permits vary dramatically. *See generally, Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986), for the various standards applied by the Circuits on this issue.[15]

The specific effect of official discretion on the availability of due process protection also produces markedly different judicial analyses. *Compare Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986) (discretion not determinative; question is whether it is likely that application would have been

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[15] Those standards vary from outright prohibition of § 1983 claims based on permit denials, even if the denial was malicious, in bad faith and illegal (*Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983)) to allowing § 1983 claims based on permit denials upon a showing that the denial was unrelated to the merits of the application (*Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 109 S.Ct. 134 (1988)). Between these poles, the standards are confusing and controversial within the Circuits. *See, e.g., Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (in banc) (10-5), *cert. denied*, 477 U.S. 905 (1986), *rev'g* 754 F.2d 1251 (5th Cir. 1985).

granted absent due process violation), *with Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983) (where statutory scheme places significant substantive requirements on agency's discretion, due process rights are conferred); and *RRI Realty Corp., supra*, 870 F.2d at 918 (Pet. App. A-16) ("opportunity of a local agency to deny" a permit defeats property interest, no matter what). *But see, Webster v. Doe*, 108 S.Ct. 2047, 2053-54 (1988) (discretion not determinative of existence of property interest).

This subject is ripe for this Court's review and guidance. The federal courts are clearly in need of unifying direction.

III

This Case Presents A Proper Vehicle For The Determination Of The Issue Raised.

The posture in which this case comes to this Court provides a perfect frame for the issue sought to be raised.

The state of New York has conclusively determined that RRI was treated arbitrarily and capriciously by the ARB and that, under the Village's own zoning code, RRI was absolutely entitled to the permit it sought.

A federal jury has determined that the respondent Village officials knowingly and intentionally treated RRI arbitrarily and capriciously for the purpose of depriving RRI of that permit, and that but for the due process violations there was at least a very strong likelihood that the permit would have been issued.

The Second Circuit majority has determined that, notwithstanding the arbitrary and capricious aetions of the ARB and the affirmative command of the Village zoning code, no constitutionally protected property interest arose because at one time the ARB had discretion to deny the permit.

Thus, the important issue sought to be reviewed by this Court is presented in its purest state, unencumbered by factual claims which might otherwise be present had the case been disposed of on a motion to dismiss or for summary judgment, or on a muddled factual record, or a fact-based court of appeals decision.

Dated: August 9, 1989

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 152, 153, 154, 329, 290—August Term 1988
Argued: October 3, 1988 Decided: March 29, 1989
Docket Nos. 88-7441, -7443, -7445, -7447, -7485

RRI REALTY CORP.,

Plaintiff-Appellee-Cross-Appellant,

—v.—

THE INCORPORATED VILLAGE OF SOUTHAMPTON, ROY L. WINES, JR., Mayor, ORSON D. MUNN, JR., PAUL PARASH, CHARLES F. SCHREIER, JR., and RICHARD L. FOWLER, Constituting the Board of Trustees of the Village of Southampton, SHERBURNE BROWN, COURTLAND SMITH, VICTOR FINALBORGO, JOHN WINTERS and MORLEY A. QUATROCHE, Constituting the Board of Architectural Review of the Village of Southampton, and EUGENE R. ROMANO, the Building Inspector of the Village of Southampton,

Defendants-Appellants-Cross-Appellees,

WILLIAM MATRICK, JR.. CARLOS NADAL, JACOB BUCHHEIT, ELISE KORMAN and MARVIN DOZIER, Constituting the Zoning Board of Appeals of the Village of Southampton,

Defendants.

Before:

FEINBERG, NEWMAN, and GARTH,*
Circuit Judges.

Appeal and cross-appeal from a judgment of the District Court for the Eastern District of New York (Charles P. Sifton, Judge) awarding plaintiff damages and attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988 (1982), after a jury trial, in a suit by a developer contending that the denial of a building permit violated his right to substantive due process.

Judgment reversed, plaintiff's cross-appeal dismissed, and case remanded with directions to enter judgment for the defendants. Judge Garth dissents with a separate opinion.

EDWARD BRODSKY, New York, N.Y. (Sarah S. Gold, Lawrence P. Gottesman, Spengler, Carlson, Gubar, Brodsky & Frischling, New York, N.Y., on the brief), *for defendant-appellant-cross-appellee Village of Southampton.*

THERESE NEILSEN, Uniondale, N.Y. (Lois H. Kleinberg, J.M. Furey & R.J. Furey, Hempstead, N.Y., on the brief), *for defendants-appellants-cross-appellees*

* The Honorable Leonard I. Garth of the United States Court of Appeals for the Third Circuit, sitting by designation.

Members of Board of Architectural Review.

EVAN H. KRINICK, Uniondale, N.Y. (Frank L. Amoroso, Richard C. Mooney, Rivkin, Radler, Dunne & Bayh, Uniondale, N.Y., on the brief), *for defendants-appellants-cross-appellees Members of Board of Trustees.*

JOHN H. MCLOONE, JR., Williston Park, N.Y. (J. Maloney, Murphy, McLoone, Nelson, Dobise & McGrane, Williston Park, N.Y., on the brief), *for defendant-appellant-cross-appellee Romano.*

GLENN S. GOLDSTEIN, New York, N.Y. (Ellen G. Margolis, Summit Rovins & Feldesman, New York, N.Y., on the brief), *for plaintiff-appellee-cross-appellant.*

(Peter Tufo, Anita Fisher Barrett, Barry M. Schreibman, Brown & Wood, New York, N.Y., submitted an amicus curiae brief for Assn. of Towns of the State of N.Y., N.Y. State Conference of Mayors & Other Municipal Officers.)

JON O. NEWMAN, *Circuit Judge*:

This appeal concerns primarily the issue of whether an applicant for a building permit, subsequently ordered to be issued by a state court, had a sufficiently clear entitlement to the permit to constitute a property interest pro-

tected by the Due Process Clause. The issue arises on an appeal by the Village of Southampton, New York, and various Village officials, from a judgment of the District Court for the Eastern District of New York (Charles P. Sifton, Judge), after a jury trial, awarding RRI Realty Corp. ("RRI") $2.7 million in damages and attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988 (1982). RRI claimed that the Village officials, acting in their official capacity, had wrongfully denied RRI's application for a building permit, thereby depriving RRI of its property without due process of law. RRI cross-appeals to challenge the pretrial ruling of the District Court denying RRI's motion to amend its complaint to assert a claim for punitive damages against the Village officials in their individual capacities.

We conclude that the record was insufficient to support a finding of such a clear entitlement to the permit as to establish a property interest protected by the Fourteenth Amendment. Accordingly, we reverse the judgment of the District Court, dismiss the cross-appeal, and remand with directions to enter judgment for the defendants.

Background

In 1979, RRI purchased a 63-room mansion and surrounding oceanfront property in the Village of Southampton. After planning extensive renovations for the mansion, RRI held discussions with the Village Building Inspector, Eugene Romano, regarding procedures for acquiring the requisite building permit. Although the plans were somewhat inchoate, it was clear that several features of the proposed design exceeded height restrictions in the local zoning code. Romano issued a limited building permit to RRI, covering only minor structural

renovations; he advised RRI not to apply for successive building permits as plans changed but to make one omnibus building permit application when its plans became final. RRI also applied for, and received, a height variance from the Zoning Board of Appeals ("ZBA") in anticipation of future construction.

Construction began in early 1981. By the spring of 1983, renovation had proceeded far enough to permit RRI to complete the final design plans for the residence. Under local law, RRI had to submit these plans to the Village's Architectural Review Board ("ARB") for approval before the Building Inspector could issue a permit. *See* Southampton, N.Y., Code § 116.32 (1984) (hereinafter "Code"). The ARB approved RRI's final overall design in May 1983. The Building Inspector then instructed RRI to submit an application to his office for a comprehensive building permit. Romano also told RRI to apply to the ZBA for another variance—this one covering the portion of the proposed structure that would exceed the height limitations of the previous variance.

With RRI's application pending before the ZBA, RRI and the Building Inspector devised a plan to divide the building permit application into three stages. Stage one represented the structural work covered by the initial building permit already issued by Romano. Stage two—the permit for which is the subject of this litigation—represented the balance of the construction that was in conformity with the zoning law and the initial variance. Stage three included that part of the structure for which a new height variance was required.

RRI submitted an application to the Building Inspector for a stage-two building permit in February 1984 along with final plans, which covered the entire project but were

marked to indicate the three stages of construction. In early April, RRI, apparently at the Building Inspector's request, submitted a new set of plans that did not include any stage-three alterations. These altered plans showed a house missing most of its roof, parts of one side, and an entire new wing. On April 11, the Building Inspector referred these revised plans and the permit application to the ARB for its final consideration. Apparently, under the Code, the ARB had to approve these more detailed designs even though it had approved plans for the overall project in 1983.

In early May 1984, the Building Inspector notified RRI, as he had throughout the spring, that a permit was about to be issued. However, no permit was forthcoming. The ARB decided to take no action on the building permit application. No one informed RRI of this decision. At about this time, the RRI project became a target of community rumor and a controversial matter in Village politics. Prominent Southampton residents attacked the project for attracting undesirable elements and promoting improper behavior. Reacting to this pressure, the Acting Mayor, a member of the Village Board of Trustees, ordered the Building Inspector to issue a stop-work order on May 17 because RRI lacked a building permit for all of the post-stage-one construction. The ZBA also denied RRI's application for its stage-three variance.

On June 1, 1984, RRI commenced an Article 78 proceeding in New York Supreme Court, Suffolk County, against the Building Inspector and the ARB to compel issuance of a stage-two building permit and to cancel the stop-work order. The court granted summary judgment for RRI, finding that the ARB had refused to approve the stage-two permit because of its awareness that the stage-

three permit would violate the existing zoning regulations and that this was an impermissible consideration for the ARB, whose role is limited by section 116-33 of the Village Code to matters of aesthetic judgment. *RRI Realty Corp. v. Romano*, No. 84-10639 (N.Y. Sup. Ct. Apr. 3, 1986) (unreported). The state court then found that by the time RRI had commenced the Article 78 proceeding, the ARB was in violation of the Code provision requiring the ARB, if it does not approve a permit application, to hold a public hearing within thirty days of its receipt of the application. Code, *supra*, § 116.32.E. Since the thirty-day period had expired, RRI was deemed entitled to the stage-two permit as a matter of law. *RRI Realty Corp. v. Romano*, *supra*. The court ordered issuance of a permit for what was "concededly legal work." *Id.*

RRI received its building permit in August 1986 and commenced this action for damages caused by the delay in the issuance of the stage-two permit and for attorney's fees and costs. The jury found in favor of RRI, awarding it $1.9 million in damages. The judgment also includes $762,970.36 for attorney's fees and costs.

Discussion

The gravamen of the complaint is that RRI had a property interest in the stage-two permit, that Village officials arbitrarily and capriciously deprived RRI of its property interest in this permit, and that this violation of substantive due process was an official Village policy for which the municipality is liable for damages under section 1983. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *see also City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). In the view we take of the case, it becomes necessary to consider only the threshold issue of whether the

evidence sufficed to create a jury issue as to whether RRI had a property interest in the stage-two permit.

I. Development of the Legal Standard

Federal courts have followed a somewhat uneven course in explicating the rationale for and the extent to which the substantive component of the Due Process Clause of the Fourteenth Amendment protects landowners in disputes with local agencies empowered to limit the permissible uses of their property. Though appellate courts frequently invoke Justice Marshall's observation that the role of the Supreme Court (and presumably of every other federal court as well) "should not be to sit as a zoning board of appeals," *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), their willingness to entertain a claim that a local land use regulator has acted arbitrarily or capriciously sometimes leads them to require trial courts to make an inquiry similar to the sort of determination that zoning boards of appeal routinely make.[1]

The initial effort to subject local land use decisions to constitutional scrutiny involved challenges to new zoning restrictions imposed upon property owners. The Supreme Court's first consideration of such a challenge, though occurring in an era when substantive due process was often a formidable protection against governmental regulation, met with a significant rebuff. *Village of Euclid v.*

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1 It has been observed, however, that the degree of scrutiny appropriate for federal courts in deciding whether local decision-making is arbitrary so as to violate the substantive due process component of the Fourteenth Amendment is less rigorous than that applied by state courts in determining whether such decision-making is arbitrary for purposes of violating state zoning law. *See Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034 (3d Cir.), *cert. denied*, 107 S. Ct. 2482 (1987); *Shelton v. City of College Station*, 780 F.2d 475, 482-83 (5th Cir.) (in banc), *cert. denied*, 477 U.S. 905 (1986).

Ambler Realty Co., 272 U.S. 365 (1926). The Supreme Court ruled that zoning regulations will survive substantive due process challenge unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. With the decline of substantive due process as a protection against economic regulation, zoning regulation continued easily to survive constitutional challenge. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). Pertinent to the later development of the case law concerning land use regulation is the fact that in the early zoning cases, there was no dispute as to whether the plaintiff had a property interest within the meaning of the Fourteenth Amendment; his property interest was in the land he owned, land that the local regulating body sought to restrict as to use.

The next phase of land regulation cases involved applications by property owners to obtain a change in existing zoning regulations. Denials of rezoning applications were challenged as a denial of property in violation of the substantive component of the Due Process Clause. Without pausing to focus on whether the property interest at stake was the land owned by the plaintiff or the zone change for which he was applying, courts generally rejected these challenges, applying the deferential standards of *Euclid*. An early rezoning application case in the District of Columbia Circuit, *Leventhal v. District of Columbia*, 100 F.2d 94, 95 (D.C. Cir. 1938), expressly relied on *Euclid*, and subsequent rezoning cases in that Circuit simply cited *Leventhal* for the applicable standard, *e.g.*, *Lewis v. District of Columbia*, 190 F.2d 25, 27 (D.C. Cir. 1951), even in those rare instances where the denial of a rezoning application was held to be arbitrary and capricious, *e.g.*,

Shenk v. Zoning Commission, 440 F.2d 295, 297 (D.C. Cir. 1971).

The analytical framework applicable to constitutional challenges to land regulation was affected by the Supreme Court's 1972 decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). Though concerned with an interest in employment, rather than land, and the protection of procedural, rather than substantive, due process,[2] both decisions were potentially pertinent to land regulation in their announcement that a property interest, within the meaning of the Fourteenth Amendment, includes not only what is owned but also, in some limited circumstances, what is sought. This expanded concept of property, however, requires more than "an abstract need or desire" or "a unilateral expectation" of what is sought. *Board of Regents v. Roth*, *supra*, 408 U.S. at 577. Instead, there must be "a legitimate claim of entitlement." *Id*; *see Perry v. Sindermann*, *supra*, 408 U.S. at 601.

After 1972, some courts considering constitutional challenges to land regulation began their inquiry by citing *Roth* and asking whether the plaintiff had a "clear entitlement" to the approval he was seeking from the land use regulating body. *See Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831 (1st Cir.) (request for approval of subdivision plan; property interest assumed), *cert. denied*, 459 U.S. 989 (1982); *United Land Corporation of America v. Clarke*, 613 F.2d 497, 501 (4th Cir. 1980)

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2 In addition to claiming denial of procedural due process, the plaintiffs in *Roth* and *Perry* both alleged that they had been denied employment for exercise of their First Amendment free speech rights. Neither case, however, involved a claim that a property interest had been denied by action so arbitrary as to violate the substantive component of due process.

(request for approval of soil erosion permit; no protectable interest "in the permit" because of discretionary authority in administrator). This same approach is reflected in *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), one of the few decisions rejecting dismissal on summary judgment of a claim that a denial of approval for land use was arbitrary and capricious and hence a denial of substantive due process. In a thoughtful opinion by Chief Judge Winter, the Court inquired whether an applicant for a building permit had a " 'protectible property interest in the permit' sufficient to trigger federal due process guarantees." *Id.* at 1418 (citing *United Land Corporation of America v. Clarke*, *supra*, 613 F.2d at 501). Chief Judge Winter concluded that the applicant had a clear entitlement to the permit under state law. In *Scott*, the applicant was not the owner of the property, although his option to purchase it would seem to have given him an interest that itself could have been considered "property" under the Due Process Clause. Chief Judge Winter characterized the interest in the applied for permit as a " 'species of property,' " *id.* at 1421 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)), though he noted that it is not in the same category as property that is protected by the Fourteenth Amendment's incorporation of the "takings" clause of the Fifth Amendment, *id.* & n.20.

Many post-1972 land regulation decisions, however, have not pursued the *Roth* analysis in land regulation cases. Instead of inquiring as to the plaintiff's degree of entitlement to what he sought, these decisions have implicitly assumed that the pertinent property interest is the property the plaintiff owns and simply examined whether the action of local regulators in denying an application for the proposed use of the land was arbitrary and capricious. This has occurred both in decisions rejecting substantive

due process challenges, *e.g.*, *Burrell v. City of Kankakee*, 815 F.2d 1127 (7th Cir. 1987) (rezoning application); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-37 (3d Cir.) (development plan), *cert. denied*, 107 S. Ct. 2482 (1987); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) (building permit); *Scudder v. Town of Greendale*, 704 F.2d 999 (7th Cir. 1983) (building permit); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (in banc) (rezoning application), *cert. denied*, 419 U.S. 837 (1974), and in the few decisions upholding such claims, at least against a motion for summary judgment, *e.g.*, *Bello v. Walker*, 840 F.2d 1124 (3d Cir.) (building permit), *cert. denied*, 109 S. Ct. 134 (1988), or for dismissal for failure to state a claim, *e.g.*, *Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066 (W.D.N.Y. 1982) (planned unit development application).[3]

Bello is a clear example of a court focusing exclusively on whether the local land use regulator acted arbitrarily and capriciously without inquiry as to whether the protected property interest is in the land the plaintiff owns and is seeking to use or in the permit he requires for his intended use; the Court extracted from prior cases, including those concerned with denial of equal protection, like *Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252 (1977), a general rule that "the deliberate and arbitrary abuse of government power violates an indi-

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3 *Cf. Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982), which rejected a claim by a property owner that granting an adjacent property owner a variance from noise ordinance violated due process requirements. In *Barbian*, the property interest of the plaintiff for purposes of the substantive due process inquiry was his ownership interest, *see id.* at 480-82; for purposes of the procedural due process inquiry, plaintiff's property interest in a noise-free setting was assumed, though acknowledged not to be clear, *id.* at 488. n.10.

vidual's right to substantive due process." *Bello v. Walker*, *supra*, 840 F.2d at 1129. *See Sheldon v. City of College Station*, 780 F.2d 475, 479 (5th Cir.) (in banc) (declining to determine whether property interest was in the right to seek a zoning variance or in the right to use the plaintiff's property), *cert. denied*, 477 U.S. 905 (1986).

Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976), also made no inquiry as to the nature of the property interest at issue, although the plaintiff there framed his claim as a denial of equal protection, rather than a denial of property without substantive due process, 539 F.2d at 259. Chief Judge Winter's opinion in *Scott v. Greenville County*, *supra*, however, expresses the view that *Cordeco* "fits more broadly into a line of cases addressing the substantive unfairness of the process by which governmental actors deprive a citizen of a protected interest," 716 F.2d at 1420 n.14, because "no recognized class-based or invidious discrimination was involved," *id.* at 1420. *See Cordeco Development Corp. v. Vasquez*, *supra*, 539 F.2d at 260 n.5 (separate views of Campbell, J.). *Cordeco* is one of the rare decisions in which a land regulation claim reached decision by a fact-finder (trial judge with an advisory jury).

In this Circuit, our post-*Roth* cases considering a landowner's claim of a due process violation in the denial of an application for regulated use of his land have been significantly influenced by the *Roth* "entitlement" analysis. In *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985), the landowner had been denied a permit to use his property for an automobile junkyard business. Expressly invoking *Roth*, Judge Mansfield focused initially on whether the landowner had "a legitimate claim of entitle-

ment" to the license he sought and formulated the test for this inquiry to be that "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Id.* at 59. Finding that the licensing authorities had discretion in the issuance of the requested permit, the Court affirmed dismissal of the claim for lack of a protected property interest *in the permit*, even though the Court acknowledged that the allegations of the complaint alleged "egregious misconduct" by the defendants in the denial of the permit, *id.* at 59.

We have adhered to the property interest analysis of *Yale Auto Parts* both in finding a claimed interest in a land use application insufficient to constitute Fourteenth Amendment property, *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210 (2d Cir. 1987) (approval sought for municipal development plan), and in finding such an interest sufficient, at least for purposes of surviving summary judgment, *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986) (application for certificates of occupancy). Our latest decision in this area, though citing the entitlement test of *Roth* and our application of that test in *Yale Auto Parts* to the permit being sought, appears to have found the requisite property interest to be an aspect of the rights enjoyed by the plaintiff as owner of his property. *Brady v. Town of Colchester*, ____ F.2d ____ (2d Cir. 1988). *Brady* is an unusual case, however, in that the owner was obliged by the local authorities to seek a permit for commercial use of his property, whereas his position was that his property was already zoned for commercial use, that no permit was required, and that the local decision obliging him to seek a permit was wholly unjustified.

It is not readily apparent why land regulation cases that involve applications to local regulators have applied the

Roth entitlement test to inquire whether an entitlement exists in what has been applied for—whether a zoning variance, a business license, or a building permit—instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.[4] As Justice Stevens has observed, "the opportunity to apply for [a zoning amendment] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 683 (1976) (Stevens, J., with whom Brennan, J., joins, dissenting). Indeed, the entitlement inquiry will not often aid the analysis in this context. When a local regulator's discretionary decision to deny an application is not arbitrary or capricious, the plaintiff will usually be deemed not to have a sufficient entitlement to constitute a protected property interest. On occasion, however, as *Yale Auto Parts* demonstrates, the plaintiff may be deemed *not* to have a protected property interest in the requested permit, even in a case where the denial of the

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4 The analytical framework for constitutional claims by plaintiffs denied requested uses of their land could be analogized to that applicable to plaintiffs denied licenses required for pursuing a particular occupation. The latter have a liberty interest in earning a livelihood and are normally not required to show an entitlement to the license they seek in order to state a claim; their liberty interest is impaired if their license application is arbitrarily denied. *See Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983). One land use regulation case has explicitly relied on occupational licensing cases at least to supply content to the substantive due process standard, if not to the nature of the interest being protected, *see Scott v. Greenville County*, *supra*, 716 F.2d at 1420, though another land use case has explicitly rejected the analogy, *see South Gwinnett Venture v. Pruitt*, *supra*, 491 F.2d at 7 n.1 ("Whatever vitality remains in *Hornsby* [*v. Allen*, 326 F.2d 605 (5th Cir. 1964) (application for retail liquor store license)] . . ., its holding will not be extended to zoning cases."

permit *is* arbitrary. The fact that the permit could have been denied on non-arbitrary grounds defeats the federal due process claim. Focusing on the authority of the local regulator thereby permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process in the particular case. In any event, *Yale Auto Parts* and its progeny have committed this Circuit to the "entitlement" inquiry in land use regulation cases.

If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land-use regulatory decisions), the entitlement test of *Yale Auto Parts*—"certainty or a very strong likelihood" of issuance—must be applied with considerable rigor. Application of the test must focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case. *See Walentas v. Lipper*, ____ F.2d ____, ____ (2d Cir. 1988); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201-02 (2d Cir. 1987); *Sullivan v. Town of Salem*, *supra*, 805 F.2d at 85. *Yale Auto Parts* rejected the claim of a property interest in the permit being sought because of the discretion of the local regulating body. Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest. The "strong likelihood" aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be

favorably exercised. Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.

II. Application of the Legal Standard

In the instant case, RRI argues that absent the alleged denial of due process, there was a "certainty or a very strong likelihood" that Village officials would have granted RRI's application. RRI points to the ARB's approval of RRI's initial overall design and to the fact that stage-two construction was in full compliance with the zoning law. Moreover, there is correspondence between the Building Inspector and RRI, as well as discussions between Romano, the Board of Trustees, and the ARB to support RRI's assertion that approval of the application could be expected. Finally, RRI argues that since the ARB's time limits within which to act on the application had expired, it forfeited any discretion it may have had and was required to approve the permit.

Our reading of *Yale Auto Parts* and its progeny leads us to reject RRI's analysis. Even though there is evidence of officials' statements that approval of the application was probably forthcoming, the fact remains that the ARB had discretion to deny RRI's application for a stage-two permit. The Village Code confers wide discretion on the ARB in reviewing the final design plans:

> The [ARB] is charged with the duty of exercising sound judgment and of rejecting plans which, in its opinion, are not of harmonious character because of proposed style, materials, mass, line, color . . . .

Code, *supra*, § 116-33.B.

Indeed, there were several reasons for rejecting the application. The Village had virtually never before approved a partial building permit.[5] Moreover, it is undisputed that the structure violated the height limit in the zoning variance that had been granted at the outset of construction. It was surely not a certainty nor a clear likelihood that state law would later be construed to require issuance of a permit notwithstanding that zoning noncompliance. In fact, when a further variance was sought to accommodate the height of the structure, it was rejected by the ZBA, and the state court denied relief. *RRI Realty Corp. v. Hattrick*, 132 A.D.2d 558, 517 N.Y.S.2d 284 (App. Div. 2d Dep't 1987). It is no answer for RRI to argue that a state court found the ARB to have exceeded its jurisdiction and ordered issuance of the stage-two permit. *Prior* to the Article 78 proceeding, there was no clear likelihood that the state court would deem issuance of a partial permit to be required.

RRI's argument that the ARB forfeited its discretion by not acting on the application within the statutory thirty-day period, and thus was required to approve the permit, is also unavailing. It may be that on the thirty-first day, RRI was entitled to the permit, as a matter of state law, as the state court held. But RRI's claim to the permit, as a matter of constitutional law, cannot be fragmented into

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5 The chairman of the ARB testified without contradiction that the ARB had never approved "part of a house as distinguished from a whole house." The Building Inspector acknowledged that in the past he had "possibly" issued a permit for a foundation so that work could proceed in advance of inclement weather, but the evidence is undisputed that no partial permits had been issued for a portion of structures, the remainder of which was not in conformity with code requirements. The stage-one permit for a kitchen, relied on by RRI, is not to the contrary, since that permit did not contemplate that other work would eventually be performed.

two claims, one subject to the ARB's discretion within thirty days and one subject to a mandatory duty to issue after thirty days. For purposes of a property interest under the Due Process Clause, the claim to the permit is indivisible. The ARB's discretion to deny the permit during the thirty-day interval deprived RRI of a property interest in the permit, regardless of how unlawful under state law the ultimate denial may have been.

In sum, we conclude, based primarily on an assessment of the powers of the ARB as they pertain to the undisputed facts of this case, that in advance of the state court ruling it could not reasonably be found that RRI had an entitlement to the stage-two permit, sufficient to invoke the protection of the Due Process Clause. As a matter of law, there was no property interest in the permit. Though the issue was submitted to the jury and it found the requisite property interest, its attention had been improperly focused primarily on the probability that the permit would be issued without adequate consideration of the discretion enjoyed by the issuing authority. The Village had unsuccessfully sought to redirect the jury's attention in its requested instructions. Our concern, however, is not simply with the jury charge but with the insufficiency of the evidence to take the property interest issue to the jury. In view of our conclusion, we need not consider whether denial of the permit violated substantive due process or whether the denial was the result of a policy that would give rise to municipal liability under section 1983.

The judgment of the District Court is reversed, plaintiff's cross-appeal is dismissed, and the case is remanded with directions to enter judgment for the defendants.

GARTH, J., *dissenting*:

Although a number of issues were raised and briefed by the parties, the majority opinion focuses solely on the threshold issue of whether RRI has demonstrated a property right which would support a constitutional claim. While I read the record in this case somewhat differently than the majority with respect to some of the subsidiary issues involved in this appeal, my major disagreement with the majority's holding is that I find that RRI has proved a property interest whereas the majority holds otherwise. The majority concludes that the record in this case is "insufficient to support a finding of a clear entitlement to the permit so as to establish a property interest protected by the Fourteenth Amendment." Maj. op. at 3. The record, however, is to the contrary. It is with respect to that issue, and that issue alone, that I think it appropriate to express my dissenting views. Thus, I will not venture beyond that subject in this opinion.[1]

I.

The majority correctly notes that the law of this Circuit addresses claims such as RRI's under the government benefit/due process line of cases. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court defined what constitutes property for the purposes of the due process clause. That definition controls our disposition here.

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1 Southampton, among other issues, objects to the imposition of municipal liability under 42 U.S.C. § 1983. While in my judgment the district court acted properly in allowing for recovery against the Village of Southampton, I note that the majority does not address that issue, just as it does not discuss other subsidiary issues. In light of that circumstance, I too confine my discussion only to the question: did RRI establish a property interest?

The Court noted that property was created by the operation of state law:

> . . . . To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

This court has had several occasions to apply the principles of *Roth* to cases where a local board has refused to grant some type of permit or authorization. In *Yale Auto Parts Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985), the court reviewed the claim of an auto parts dealer who alleged that the West Haven Zoning Board of Appeal's refusal to approve his application for a new business site, amounted to "arbitrary and capricious" behavior and violated his due process property rights. The district court granted the Zoning Board judgment on the pleadings.

In affirming the district court, this court held that the appropriate line of inquiry was whether the applicant had a legitimate claim of entitlement to the issuance of the certificate or license. The court held that the question as to whether an applicant had a claim of entitlement "depend[s] on whether, absent the alleged denial of due process, there is either a *certainty or a very strong likeli-*

hood that the application would have been granted." *Yale Auto Parts*, 758 F.2d at 59 (emphasis added).

In applying this principle to the facts of the *Yale Auto Parts* case, this court noted the broad discretion vested in the Zoning Board. Given this discretion, the court reasoned that the Zoning Board might properly have denied Yale's application in exercising its authority granted by state law, and therefore it was by no means a certainty or a strong likelihood that the appellant would have received the permit. Thus, the court affirmed the district court's judgment.

In *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986), this court again addressed the principle announced in *Yale Auto Parts*. The plaintiff in *Sullivan* sought to recover for the Town's refusal to issue a Certificate of Occupancy and to accept the roads he had laid out. As in the instant case, the Town inexplicably refused to rule on Sullivan's application, and only did so after Sullivan brought a state court proceeding in the nature of a Writ of Mandamus. Again, as in the case before us today, Sullivan sought to recover for the damages he suffered by the time delay.

The district court granted summary judgment to the Town relying upon *Yale Auto Parts*. In reversing, this court clarified its holding in *Yale*. The court reiterated the "very strong likelihood standard" standard set forth in *Yale* but stated:

> By that standard we did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action; a theoretical possibility of discretionary action does not automatically classify an application for a

> license or a certificate as a mere "unilateral hope or expectation." On the contrary, our standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.

Sullivan, 805 F.2d at 85.

The *Sullivan* court then noted that the Town had refused to grant the Certificate of Occupancy because the roads had not been accepted for dedication, despite the fact that there was no lawful basis for refusing the certificate on this ground. *Id.* The court also observed that, but for this unlawful reason, Sullivan's application conformed (given the posture of the case) in all other respects to the requirements for a Certificate of Occupancy, and that he was thus entitled to it. This court thus reversed and remanded the case to the district court for a trial.

In *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210 (2d Cir. 1987), a developer, Dean Tarry, sought approval for a multi-family dwelling in Tarrytown, New York. The Town's Planning Board rejected the plan, and Dean Tarry brought an Article 78 proceeding in state court to compel approval.[2] The New York Supreme Court found that

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2 An Article 78 proceeding is the means by which an aggrieved person can challenge the determination of a governmental or quasi-governmental body in New York State's courts. The statute governing these proceedings is found in the NYCPLR §§ 7801-06. Dean Tarry actually brought two Article 78 proceedings. In the first, the New York Supreme Court ruled that Dean Tarry was entitled to approval, and ordered the Planning Board to approve the plan. However, the New York Appellate Division reversed and remanded the case to the Planning Board to make factual findings. *See Dean Tarry Corp. v. Friedlander*, 826 F.2d 210, 211 (2d Cir. 1987). It is the subsequent proceeding after remand which is relevant here.

Dean Tarry's application had met all of the technical requirements and that the application should have been approved. In particular, the New York court found that the ordinance by which the Town had refused the application was invalid. The New York court directed that Dean Tarry's application be approved and the New York Appellate Division affirmed. *See Id.* at 211. The Town then amended its zoning ordinance so as to prevent approval of Dean Tarry's plan. Dean Tarry then filed a new plan which would comply with the new ordinance, but the Board never voted on this new plan as three members recused themselves, thus preventing a quorum from meeting.

Like RRI in the present case, Dean Tarry filed suit in federal court asserting due process violations, under § 1983, because approval of its initial application was denied. The district court granted summary judgment to the Town, holding, *inter alia* that Dean Tarry did not possess a property interest in the approval of its plan. This court affirmed, distinguishing *Sullivan* and noting that:

> In *Sullivan*, the unlawful requirement preventing approval of the builder's application came out of thin air; it is *not* derived from an existing legislative or administrative standard such as the Tarrytown zoning ordinance. *See Sullivan*, 805 F.2d 85. Having met all existing requirements, the *Sullivan* plaintiff clearly would have had a "certainty or a very strong likelihood" of success at the time he submitted his application.
>
> In contrast, Dean Tarry's application was rejected pursuant to a zoning ordinance, extant at the time Dean Tarry submitted its plan for approval, that conferred broad discretion on the Planning Board. As in

> *Yale Auto Parts*, this discretion, embodied in the governing law, prevented Dean Tarry's expectation of success from rising to the level of certainty required to give rise to a cognizable property right.

Dean Tarry, 826 F.2d at 213 (emphasis in original).

The most recent treatment of the *Yale Auto Parts* principle by this court appears in *Brady v. Town of Colchester*, 87-7908 (December 1, 1988). In that case, Brady, the recent purchaser of a building being used for commercial purposes, was refused a Certificate of Use and Occupancy and a zoning permit by the Colchester Planning and Zoning Commission ("CPZC") on the grounds that his building was actually zoned for residential and not commercial purposes. Brady, by a mandamus proceeding brought in state court, ultimately forced the CPZC to provide him with the Certificate. Brady thereafter brought suit for damages in federal court under 42 U.S.C. § 1983, alleging that the CPZC had *inter alia*, deprived him of property, i.e., the zoning permit and the Certificate of Occupancy, in contravention of due process.

The district court granted summary judgment to Colchester. This court noted that if the property had been zoned for commercial use, the CPZC would have had no power under Connecticut law to deny Brady a Certificate of Occupancy, and therefore was acting beyond its authority. The *Brady* court concluded that if the CPZC did not have the authority to act as it did under Connecticut law, then the *Yale Auto Parts* test would be satisfied and Brady would have established a protectible property interest. The case was remanded to the district court for a trial to determine the zoning status of the property in question.

I believe the standard to be distilled from these cases is as follows: as with all government benefit/due process

cases, the inquiry must focus on the legitimate expectations of the party seeking the government benefit. If the government is afforded broad discretion in conferring the benefit, and articulates reasons for denying the benefit within that discretion, then a plaintiff cannot prevail in establishing a constitutionally protected property interest. However, where the government's discretion is limited by law and the government acts outside that limitation, or where the government's articulated reason for denying the benefit is without basis in law, and no other lawful impediment to granting the application exists, then a plaintiff may assert an entitlement sufficient to support a constitutional claim. My reading of the majority opinion reveals no difference between the standard the majority employs and the standard I have set forth here.

II.

I turn now to the task of applying this standard to the facts of this case. In my view, the key to resolution of this appeal lies in the undisputed fact that although the Architectural Review Board was required by law to act within 30 days of the receipt of RRI's application for a permit, it did not do so. Section 116-32 E. of the Village of Southampton Code requires that the ARB act upon applications for building permits within 30 days. That provision reads:

> E. The failure of . . . the Board to approve an application or of the Board to hold a hearing on any application which may have been referred to it, within thirty (30) days, or to render its decision within ten (10) days of the closing of the hearing thereon, shall entitle the applicant to prompt issuance of a building permit, provided that all other applicable requirements have been satisfied.

As I have just noted, it is undisputed that the ARB and the building inspector failed to act upon RRI's application within the prescribed time period mandated by Village Code § 116-32 E. By failing to act within the stated 30 day period, the ARB and the building inspector became bound by the Code to issue RRI's building permit.

The New York Supreme Court, in its opinion holding that RRI was entitled to the stage two building under state law, made a number of factual findings which are entitled to be given effect under the doctrine of collateral estoppel or issue preclusion. *See Petrella v. Siegel*, 843 F.2d 87, 90 (2d Cir. 1988). Among other things, that court found:

> The Code prescribes that the building inspector must either approve or disapprove of building permit applications within sixty (60) days of their submission. See Code § A119-3(A).
>
> In addition, the Code requires that the Architectural Review Board hold a public hearing on any application referred to it for consideration which a committee of the Board had failed to approve. See Code § 116-32(B), (E). The public hearing must take place within thirty (30) days of the reference of the application to the Board and the Board must render its decision within ten (10) days of the hearing. See Code § 116-32(E). The petitioner commenced this proceeding on June 1, 1984. By that date, the sixty days which the Code (§ A119-3[A]) affords the building inspector to approve or disapprove a building permit application had passed without an approval or disapproval. Moreover, by June 1, 1984, the thirty days which the Code (§ 116-32[E]) affords the Architectural Review Board to hold a public hearing on any permit application referred to the Board but not

approved by a Board Committee had also passed without a hearing.

* * *

Respondents final argument that the building permit application fell into the category of not meeting "other applicable requirements" as that language is found in § 116-32(E) of the Code must be dismissed. The Stage Two building permit application by its very terms as devised by the building inspector represented construction of the pre-existing building in conformance with the zoning ordinance. . . .

* * *

. . . . The respondents abrogation of the statutorily-prescribed time limits in failing to hold a hearing and rendering a determination as to the building permit application mandates a direction compelling the issuance of the permit. . . .

(A. 336, 337, 338).

Thus, after the 30 day period had expired, the building inspector, Romano, and the ARB no longer had any discretion to deny a permit, and RRI is correct in claiming that as a matter of law it became entitled to the permit. *See e.g. Sullivan*, 805 F.2d at 85. Indeed the jury, which was provided with a copy of the Village Code when it commenced its deliberations, concluded as much in finding for RRI.

Not surprisingly, neither the majority opinion nor the defendants offer any meaningful, let alone convincing, refutation of this argument. The Southampton defendants in their Reply Brief, argue that RRI cannot rely on § 116-32 E. of the Village Code because that section provides for

the issuance of permits only if the building complies with the Code and that despite the express provisions of § 116-32 E., no property right can be created simply because of the passage of time. Reply Brief of the Village of Southampton at 12-13. In so stating, however, the Southampton defendants ignored, and did not respond to, the fact that the Building Inspector, Romano, had signed the building permit form on May 4, 1984 (E. 259; T. 379), thereby establishing the fact that "all other applicable requirements" had been satisfied (Village Code § 116-32 E.), just as the New York State court found in the Article 78 proceeding. Indeed Romano himself had informed RRI of the permit's issuance. (T. 1478-79). Moreover, the Southampton defendants, as well as the majority opinion, completely ignore the highly significant concession made in the opening statement by counsel for the ARB:

> . . . . Of interest is the requirement in the village rules to make sure that the architectural review system does not slow things down where people are entitled to action.
>
> *If no action is taken within thirty days after a submission, then it is considered to be the equivalent of a grant.* So whatever the judgment of the architectural board was or was not at that time, whether it was agreeable or not agreeable, after thirty days it became irrelevant.

(S.A. 47-48) (emphasis added).

The majority's treatment of RRI's thirty day argument is even less persuasive. The majority opinion concedes that: "It may be that on the thirty-first day, RRI was entitled to the permit as a matter of state law, as the state court held." Maj. op. at 19. However, the majority then proceeds to formulate a principle that to my knowledge

has no precedential support in any body of law. The majority holds that constitutionally, RRI cannot assert that it acquired a property interest in its pending permit when the ARB failed to act within the thirty day period prescribed by the Village Code. The reason given by the majority is that while the ARB had discretion to grant or deny a permit during the prescribed thirty day period, that lawful discretion also ". . . deprived RRI of a property interest in the permit, regardless of how unlawful under state law the ultimate denial may have been." Maj. op. at 19. This is so, claims the majority, because ". . . RRI's claim to the permit as a matter of constitutional law, cannot be fragmented into two claims, one subject to the ARB's discretion *within* thirty days and one subject to a mandatory duty to issue *after* thirty days." (emphasis added.)

Unfortunately, the majority has failed to inform us where this law of "non-fragmentation" originates and what provision of the Constitution forbids the acquisition of a property interest when the relevant legislation decrees otherwise. In effect, the majority's holding announces a new and novel principle of state law, that when appropriate legislation vests discretion in a governmental body for a discrete period of time (here, thirty days) and then the same legislation divests that discretion after the prescribed time period has expired, that nevertheless somehow the discretion remains. The majority cites to no state, federal or statutory authority in support of this principle. Indeed, this is not surprising since the majority's reasoning on this point directly conflicts with the established precedent of this Circuit. In *Sullivan v. Town of Salem*, *supra*, this court clearly stated:

> . . . we did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action; a theoretical possibility of discretionary action does not automatically classify an application for a license or a certificate as a mere "unilateral hope or expectation." On the contrary, our standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.

Sullivan, 805 F.2d at 85.

When the ARB did not act, as it was bound to do within the stated 30 day time limit, RRI's right to a building permit for the stage two construction became vested. No discretionary action of the ARB could divest that right or change that result. Indeed the record clearly reveals no evidence that the Village Code means anything other than what its plain language states. It is significant to me that although the majority opinion and the Southampton defendants baldly assert that § 116-32 E. cannot create a property right simply because the time has expired, they point to no evidence, and can provide no legal citation supporting that proposition. If the law of this Circuit is to be consistently applied, it is evident to me that RRI's application for a permit had a very "strong likelihood" of being granted, *Yale Auto Parts*, 758 F.2d at 59, given the fact that the ARB had been deprived of any discretion by its failure to act within thirty days.

My analysis is bolstered by the jury verdict which, under appropriate legal instruction from the district court, found that a property interest existed. I too am troubled by the

fact that the district court found it necessary to submit the issue of whether there was a property interest to the jury rather than deciding that issue as a matter of law for the court.[3] Nevertheless, the jury, with all of the evidence before it, including the Village Code in which § 116-32 E. appears, found that RRI had a property interest warranting constitutional protection. It did so pursuant to the district court's charge, which correctly set forth the relevant law in this area:

> The property which plaintiff asserts it was deprived of is its asserted right to the issuance of the second stage building permit in order to continue building or construction.
>
> In connection with this claim I instruct you that a property interest for the purposes of the Fifth and Fourteenth Amendments include not only things that we have an absolute right to, such as things we can own or possess out right [sic], but also such things as to which we have not simply a hope or expectation of acquiring, but a very strong likelihood of acquiring.
>
> Accordingly, if you find by a preponderance of the evidence that there existed a very strong likelihood that but for a defendant denying the plaintiff due process of law, that the plaintiff would have obtained the building permit for second stage construction, then

---

3 The majority opinion treats this issue in a somewhat equivocal manner. Early in its opinion it states "In the view we take of the case, it becomes necessary to consider only the threshold issue of whether the evidence sufficed to create a jury issue as to whether RRI had a property interest in the stage-two permit." Maj. op. at 7. However, later in the majority opinion, the majority states: "Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an application has a property interest will normally be a matter of law for the court." Maj. op. at 17.

> you may find that the plaintiff possessed a property interest in the issuance of the building permit.

(T. 2432).

Thus, even if the district court erred in submitting to the jury for determination, what would appear to be a matter of law, that error was obviously harmless because the jury reached the only result that it could reach in light of the undisputed fact that the Board had exceeded its permissible time limit when it failed to act on RRI's application.

III.

I appreciate the reluctance of the majority to "become [a] zoning board of appeal in reviewing non-constitutional land use determinations made by the Circuit's many local legislative and administrative agencies." *See Sullivan v. Town of Salem*, 805 F.2d at 82 (2d Cir. 1986). However, that reluctance, I suggest, must give way to the established law of this Circuit when the record discloses, as this record does, not only a "very strong likelihood" that a permit would have been granted, but as appears in this case, a "certainty" that it had to have been granted.

The linchpin in this case, as I have pointed out, was the failure of the ARB to act within the time prescribed by the Village Code. When that time expired, the right of RRI to a building permit vested and could not be defeated. The majority opinion fails to explain adequately why this right does not constitute a valid property interest protected under the Fourteenth Amendment. Nor does the majority give a reasoned explanation as to why, on the thirty-first day after the ARB failed to act, RRI did not have either a "certainty or very strong likelihood" that its application would have been granted. *Yale Auto Parts*, 758 F.2d at 59.

Of even greater importance is the fact that the majority opinion disregards this court's prior pronouncement and holding in *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986), where the court recognized that an applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation, the application would have been granted. The *Sullivan* court, in so holding, acknowledged that a mere theoretical possibility of discretionary action could not defeat an applicant's property interest expectation. *Sullivan*, 805 F.2d at 85. Here, of course, we do not even have a theoretical possibility of discretion remaining in the ARB *after* the thirty day period had expired without the ARB having taken action. But even if such a theoretical vestige of discretion was retained by the ARB, under *Sullivan* that vestige or theoretical possibility would still be insufficient to defeat RRI's property interest claim.

I am thus unable to reconcile the majority's application of the *Yale Auto Parts* standard or the majority's reading of *Sullivan v. Town of Salem* with this Circuit's jurisprudence to date. The majority's holding here can lead only to confusion in this area of the law. It is for that reason that I dissent. Contrary to the majority therefore, I would hold that RRI had a legitimate claim of entitlement to the issuance of its building permit—a claim constituting a property interest sufficient to invoke constitutional protection. I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in New York, on the 15th day of May one thousand nine hundred and eighty-nine.

Docket Nos. 88-7441, 88-7443, 88-7445, 88-7447, 88-7485

RRI REALTY CORP.

Plaintiff-Appellee
Cross-Appellant,

-v.-

THE INCORPORATED VILLAGE OF SOUTHAMPTON, et al.,

Defendants-Appellants
Cross-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc filed by herein by counsel for the Appellees RRI Realty Corp.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is denied, Judge Leonard I. Garth dissenting.

"Judge Garth would grant the petition for Panel Rehearing. He would do so because in his view, the majority opinion's holding is in direct conflict with the standard prescribed in *Yale Auto Parts v. Johnson*, 758 F.2d 54 (2d Cir. 1985), as refined in *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986). He also is of the view that the majority opinion is internally

inconsistent in prescribing the standard for whether the court or the jury must determine the existence of a property interest (*see* footnote 3 in Judge Garth's dissenting opinion)."

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
Elaine B. Goldsmith,
Clerk

U.S. CONST., amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983 (West 1981)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

VILLAGE OF SOUTHAMPTON, N.Y.,
CODE ch. 116, § 116-32(E)
(Gen. Code Pub. Corp. 1984)

The failure of a committee of the Board [of Architectural Review] to approve an application [for a building permit] or of the Board to hold a hearing on any application which may have been referred to it, within thirty (30) days of the closing of the hearing thereon, shall entitle the applicant to prompt issuance of a building permit, provided that all other applicable requirements have been satisfied.

VILLAGE OF SOUTHAMPTON, N.Y., CODE ch. 116, § 116-33 (Gen. Code Pub. Corp. 1984)

Duties of Board.

A. The Board of Architectural Review is charged with the duty of maintaining the desirable character of the municipality and of disapproving the construction, reconstruction and alteration of buildings or signs that are designed without consideration of the harmonious relation of the new or altered building to such buildings as already exist and the environs in which they are set.

B. The Board is charged with the duty of exercising sound judgment and of rejecting plans which, in its opinion, are not of harmonious character because of proposed style, materials, mass, line, color, detail or placement upon the property or in relation to the spaces between buildings or the natural character of landscape or because the plans do not provide for the location and design of structures and open spaces so as to create a balanced and harmonious composition as a whole and in relation to its several parts and features to each other.

MEMORANDUM

SPECIAL TERM PART I
By: Alfred M. Lama
J.S.C.
Dated: April 3, 1986

Index No.: 84-10639
Motion No.: 6,043
Hearing Date: October 15, 16, 17, 18 & 31, 1984

SUPREME COURT, SUFFOLK COUNTY

In the Matter of
the Application of :
RRI REALTY CORP.,

Petitioner,
:
For a Judgment Pursuant to
Article 78 of the CPLR, :

vs. :

EUGENE ROMANO, :
Building Inspector
for the Village :
of Southampton,

Respondent.

BURNS, SUMMIT, ROVINS & FELDESMAN, ESQS.
Attorneys for Petitioner
445 Park Avenue
New York, NY 10022

ANTHONY B. TOHILL, P.C.
Attorney for Respondent
6 East Main Street
Riverhead, NY 11901**

This is an Article 78 proceeding in the nature of mandamus seeking a judgment of this Court directing that the respondent Eugene R. Romano as Building Inspector for the Village of Southampton to issue a "stage two" building permit. The respondent Romano had cross moved for a judgment dismissing the petition on the grounds that the petitioner failed to exhaust all of the adequate administrative remedies available to it and on the grounds that there were no arbitrary and capricious actions taken against the petitioner. A third objection to the proceeding was addressed by this Court in a Memorandum Decision dated July 31, 1984 wherein the Architectural Review Board of the Village of Southampton was found to be a necessary party to the proceeding and pursuant to CPLR §1003 was joined as a party. Said decision further ordered an Evidentiary Hearing to be held at which four questions would be addressed by the parties. The four issues were as follows: (1) when, if ever the building permit application was referred to the Architectural Review Board; (2) the reason or reasons that either the Committee of the Board or the full Board itself either refused to consider the application or denied the application; (3) whether the Board or the attorney for the Board contacted either the petitioners, their agents or attorneys with respect to the refusal or denial and reasons therefor; and (4) whether petitioners have exhausted their administrative remedies.

The fact finding hearing took place on October 15, 16, 17, 18, and 31, 1984. Following the preparation and delivery of the trial transcripts, on March 13, 1985 the petitioner served a cross-motion for summary judgment on its petition.

For a full understanding of the issues involved a certain amount of historical background is necessary. In 1979, the petitioner purchased the property in question a 6.3 acre parcel of improved land located on Meadow Lane, Southampton.

The property contains a 63 room residence which had been constructed by Henry DuPont in about 1926 and which over recent years had fallen into a state of disrepair. In early 1980, the petitioner began the process of demolition and renovation.

In that year the respondent Romano issued two building permits to the petitioner, one for a walkway over the dunes and another for proposed substantial renovation of a large kitchen area. In addition, the petitioner obtained a limited height variance for a portion of the building's roof from the Zoning Board of Appeals of the Village of Southampton. Petitioner's plans for the project were and remain very ambitious, with designs and proposals evolving as construction progressed. It is unchallenged by the affidavits and the testimony offered that conversations between the petitioner and the respondent Romano lead to a situation wherein successive building permit applications each time a change in the building plans was made was discouraged, and, instead, the petitioner would file for one building permit application once a final set of plans was completed. Respondent Romano kept in close contact with the project by making many visits to the site, viewing the construction taking place and discussing the work with Mr. Olson, the project engineer. Over the course of construction Mr. Romano received dozens upon dozens of sets of revised plans from the petitioner and obtained information elsewhere regarding the actual progress of construction. Mr. Romano constantly requested a final plan for a building permit, and yet, throughout the period of construction, respondent Romano continued to visit the site, receive revised plans and check on the construction. Demolition, renovation and construction proceeded accordingly. The petitioner concedes that during this time frame portions of the roof area were erected to a height in excess of the pre-existing non-conforming height as modified by the above mentioned variance obtained by petitioner.

The petitioner additionally spent much time before the respondent Architectural Review Board in an effort to obtain final design approval. Disagreement as to the aesthetics of petitioner's design was finally resolved on May 23, 1983 when the Board rendered its judgment in favor of the design. The minutes of that meeting reveal the following:

> "Particular points were the height of the chimneys and tower but it was agreed upon that this board

> should restrict its judgment to the general aesthetics of the work rather than zoning restrictions which were not within their province of jurisdiction....
>
> The owners representatives were asked to keep this board apprised of any future proposed changes and updated on their working plans."

Thereafter, on June 7, 1983, respondent Romano wrote to the project engineer requesting that petitioner apply for a building permit:

> "Now that the Board of Architectural Review has approved the design of the ... residence, it will be necessary for you to file for a Building Permit."

On July 11, 1983 respondent Romano informed the petitioner that although the pre-existing building was legally nonconforming, any expansion of the pre-existing building would require variance relief from the Zoning Board of Appeals. On September 21, 1983 the petitioner complied with Respondent/Romano's suggestion and filed its application for zoning variances with the Board of Appeals as to height and a setback from crest of dune. At this time while the variance application was pending, discussions were had concerning a proper vehicle to obtain a building permit in view of the pending variance application. Respondent Romano devised a plan whereby the permit application would be divided into stages. Stage one represented the kitchen area for which a permit had already been issued; stage two represented the balance of the pre-existing building which was in conformance with the zoning ordinance; stage three represented the expansion of the pre-existing building for which a zoning variance had been sought.

It was determined that the petitioner would seek only a stage two permit, thereby permitting work concededly in conformance with the zoning ordinance to continue. The procedure was confirmed by the Village attorney. Plans submitted in February of 1984 were physically marked by the

respondent Romano deleting all stage 3 work, leaving just what was encompassed in the stage 2 building permit. By letter dated March 7, 1984 after reviewing the plans, respondent Romano stated:

> "... The alteration work for Stage No. 2 appears to be within the pre-existing building, according to your plans. Therefore, I am prepared to issue a building permit for alterations within the pre-existing building. Before issuing a building permit, I will require a separate certification by you as project engineer of the estimated cost of construction of the alterations contained in Stage No 2."

On April 3, 1984 the petitioner submitted a new set of plans limited to the stage 2 area, except for a roof line, which was again physically eliminated with a horizontal line.

It is at this point that having heard nothing concerning the fate of its permit application, on June 1, 1984, by order to show cause, the petitioner commenced this proceeding to obtain the stage two building permit.

As this Court has previously held, the Building Inspector, once the application for a building permit is complete, the application and plans must be referred to the Architectural Review Board (see Section 116.32(b) and 116.37(b) of the Village Code). The prior determination of May 23, 1983 before the Board does not eliminate this requirement.

This Court now turns to the four questions posed by its previous decision.

First, it is the finding of this Court that the building permit application was referred to the Architectural Review Board on April 11, 1984. The petitioner had of course paid the application fee of $7,415.00 on February 24, 1984, but admittedly it was not until April 3, 1984 that requested set of plans was submitted to the respondent Romano. Petitioner's building permit submission was complete and on April 11,

1984, respondent Romano appeared for the second time, within a short period of time, to refer the permit to the entire Board.

Secondly, as to the reasons why the Board either refused to consider or deny the application, this Court makes the following conclusions. An attempt was made by the respondents at the hearing to justify their actions on April 11, 1984 as owing to the fact that the building permit applied for was for only stage two work and that therefore the plans submitted were not complete. It would appear that the official view advanced by the respondents is that the Board would not sign a partial building permit. However various other reasons were elicited by counsel and the Court, the most important being that the Architectural Review Board knew of the zoning violations, they knew of the pending application for a variance as to the height violations and that the "... feeling was that we would in no way be put in the position to violate that, whether or not we agreed aesthetically with the home as we had seen it in May of 1983" (Brown, transcript p. 56-57, October 16, 1984). The Chairman of the Respondent Board, Dr. Brown, admitted that aside from these violations as to height he would have signed the plans (transcript p. 59) and that, in fact, the roof as shown on the plan submitted to the respondent Board in April of 1984 was aesthetically satisfactory to him (transcript p. 529, 559, October 31, 1984). This Court must conclude that the refusal to sign petitioner's application by the Board was due to considerations exceeding its jurisdiction.

The Architectural Review Board entertains very limited jurisdiction. It is charged only with disapproving or rejecting plans which it finds to be aesthetically undesirable (Code §116-33). Dr. Brown testified that the Board's sole purpose is to pass upon the aesthetic appearance of a home. It possesses no jurisdiction over zoning matters which is reserved for the Zoning Board of Appeals.

The Board acted arbitrarily and capriciously as to this petitioner in that when faced with a similar situation involving possible zoning violations the Board, in its May 23, 1983

determination, recognized its limited authority and approved petitioner's design. In light of testimony to the effect that the Board had, in the past, approved partial plans on condition that a final approval is obtained, it is the conclusion of this Court that the true reason for the Board's inaction was due to the stage three height violations, despite the fact that it was being called upon to approve only stage two construction which is in total compliance with the zoning code. Additionally, this Court is cognizant of the fact that political implications had a significant impact on the events as they transpired throughout the time frame of this building application. Whether it be the local village elections, the local press or independent political bodies, such as the Southampton Association, testimony existed upon which this Court could conclude that political implications improperly entered into the determination of the respondent Board.

Thirdly, as to the question of whether the Board or the attorney for the Board contacted the petitioners with respect to the refusal or denial and reasons therefor, it was conceded by all who testified that no one connected with the respondent Board ever notified the petitioner as to a denial of the building permit application until June 27, 1984.

Before this Court entertains the final question posed, certain statutory implications of the zoning code must be examined.

The Code prescribes that the building inspector must either approve or disapprove of building permit applications within sixty (60) days of their submission. See Code § A119-3(A).

In addition, the Code requires that the Architectural Review Board hold a public hearing on any application referred to it for consideration which a committee of the Board had failed to approve. See Code §116-32(B), (E). The public hearing must take place within thirty (30) days of the reference of the application to the Board and the Board must render its decision within ten (10) days of the hearing. See Code §116-32(E). The petitioner commenced this proceeding on June 1, 1984.

By that date, the sixty days which the Code (§ A119-3[A]) affords the building inspector to approve or disapprove a building permit application had passed without an approval or disapproval. Moreover, by June 1, 1984, the thirty days which the Code (§ 116-32[E]) affords the Architectural Review Board to hold a public hearing on any permit application referred to the Board but not approved by a Board Committee had also passed without a hearing.

If the respondents are to be successful in their opposition to this application they must prevail on their contention, as raised by the fourth question posed, that the petitioner has not exhausted its administrative remedies.

It is beyond cavil that a litigant must first exhaust all adequate and available administrative remedies before the Courts will entertain jurisdiction over the actions of an administrative agency.

In the instant matter the respondents allege that the petitioner was premature in commencing this proceeding since it did await the determination of the Building Inspector and did not wait in turn to appeal to the Zoning Board of Appeals pursuant to §116-34. This Court cannot agree and the argument is without merit. Respondents cannot now use as a shield their inaction on the building permit application to defeat petitioner's action. Had respondents acted on petitioner's application within the statutory time frame, perhaps then the argument of failure to exhaust administrative remedies would be valid. However they did not. By June 1, 1984, petitioner's only recourse to obtain the permit was to commence this proceeding. A proceeding to compel the issuance of a permit upon the failure of an administrative agency to take action within the statutorily-prescribed time period, is a proper vehicle to obtain the permit as approved by default, as a matter of law. See *DiStefano* v. *Miller* A.D.2d , N.Y.L.J., January 17, 1986, p. 13, col 1; *Matter of Sun Beach Real Estate Dev. Corp.* v. *Anderson*, 98 A.D.2d 367, 469 N.Y.S.2d 964, 62 N.Y.2d 965, 479 N.Y.S.2d 341; *Walberg* v. *Planning Bd. of*

Town of Pound Ridge, A.D.2d , N.Y.L.J., December 12, 1985, p. 12, col.3.

On June 1, the petitioner was properly before this Court. The June 27, 1984 subsequent and belated return of petitioner's application cannot divest this Court of subject matter jurisdiction which had then been obtained.

On June 1, 1984 the petitioner had no administrative remedy to contest the building inspector's wrongful withholding of the permit pursuant to the statutorily-prescribed time limits, the petitioner had no alternative but to commence this proceeding; based upon the complete failure to act.

The respondents' reliance upon *Perrotta* v. *City of New York*, 107 A.D.2d 32, 426 N.Y.S.2d 941, N.Y.L.J., March 25, 1985, p. 27 col. and *Ackerman* v. *The New York County Branch*, Misc.2d , , N.Y.S.2d , N.Y.L.J. May 9, 1985, p. 6. col. , is misplaced. In *Perrotta*, *supra*., the building permit was revoked and the Court held that petitioner's failure to appeal the revocation of the building permit to the Board of Standards and Appeals precluded him from commencing the Article 78 proceeding. However in the instant case there exists no such similar action by the governmental body, the petitioner herein complains of governmental inaction.

Respondents' final argument that the building permit application fell into the category of not meeting "other applicable requirements" as that language is found in §116-32(e) of the Code must be dismissed. The Stage Two building permit application by its very terms as devised by the building inspector represented construction of the pre-existing building in conformance with the zoning ordinance. Additionally Respondent/Romano testified that it was not the responsibility of the Architectural Review Board to inquire into the tidal flood plain ordinance and the site plan (transcript p. 146, October 16, 1984). In fact a site plan was provided.

It is the determination of this Court that the testimony offered at the fact-finding hearing resolves the four questions posed by prior Order in favor of petitioner and therefore respondents' motion to dismiss is denied.

As to the cross motion by petitioner for summary judgment pursuant to CPLR §3211(c) on its petition, this Court agrees with the petitioner that this action is a proper candidate for conversion to a motion for summary judgment. See *O'Hara* v. *DelBello*, 47 N.Y.2d 363, N.Y.S.2d . Upon consideration of the testimony offered, the pleadings, briefs and affidavits submitted, summary judgment is granted to the petitioner on its application. The respondents' abrogation of the statutorily-prescribed time limits in failing to hold a hearing and rendering a determination as to the building permit application mandates a direction compelling the issuance of the permit. The Stage Two building permit is for concededly proper legal work. The respondents are not prejudiced by the issuance of a Stage Two building permit since for any change in the roof line to be effective, if it is different from the May 23, 1983 roof line, must meet with approvals from the respondents. As to the ancillary issue of the variance for the roof, since the Zoning Board of Appeals has denied the variance request and since the determination has been upheld by Special Term in a decision dated June 28, 1985 (Baisley, J.), the petitioner cannot proceed with Stage Three construction in violation of the Zoning Code. Unless the petitioner is successful on its appeal to the Appellate Division, Second Department, it is obvious that the respondents will be able to enforce its height restrictions as found in the Zoning Code as modified by the 1980 variance. Without judicial intervention, construction cannot exceed the authority granted by the 1980 variance. Respondents' position is still protected by this determination to grant petitioner summary judgment.

Accordingly, for the reasons stated above respondents' motion to dismiss is denied and the cross motion by petitioner for summary judgment pursuant to CPLR §3211(c) is granted and the respondent building inspector is directed to issue a "Stage Two" building permit to the petitioner.

Settle judgment pursuant to CPLR §7806.

/s/
ALFRED M. LAMA, J.S.C.

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